IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

SECOND APPEAL NO. 422 OF 2003

Qutbuddin Mohd. Hanif Khutiwala... Appellant

versus

Hamidabai Abdul Quddus Ansari
and others .....respondents.

Smt. Anita G. Bhaktwani for the appellant
Shri P.S.Dani for repondent no.1.

CORAM; V.R. KINGAONKAR, J.
DATED; 11TH JANUARY 2007

P.C.:

1. Heard the learned counsel for the parties.

2. This appeal is filed by the original defendant no.2. Respondent no.1 is the original plaintiff who had filed a suit against respondent no.2 for perpectual injunction in respect of survey no. 38 Hissa No.1-B. The plaintiff alleged that the defendant no.1 attempted to encroach and lateron constructed a part on the land to the extent of 22 ft.x 38 ft. during the pendency of the appeal. The plaintiff further alleged that the defendant no.2 was inducted into possession of that room which was raised in the encroached portion. The trial court decreed the suit for injunction and also directed removal of the encroachment. The defendant no.2 filed appeal

against the decree which came to be dismissed.

3. It is worthy to be noted that the alleged encroachment is attributed to original defendant no.1 who has not challenged the findings of both the courts. The defendant no.2 who is the appellant herein, has no concern with the property in question, except that he was in possession as was inducted by defendant no.1. The findings of the facts as recorded by both the courts, cannot be disturbed.

4. The learned counsel Ms. Bhaktwani for the appellant submits that rough sketch of the encroachment ought to have been filed along with the claim when the suit was amended. She invited my attention to the requirements of Order 7 Rule 3 as amended by the Bombay High Court. It is true that under the amendment, the Bombay High Court made it mandatory that in case of encroachment, a sketch showing as approximately as possible the location and extent of encroachment shall be filed along with the sketch. Though the word "shall" is used in the amended provision, yet there is no penal provision so as to warrant interference that if the provision is not complied with then the suit itself should be non-maintainable. The procedural law is hand made to serve justice. The appellant/defendant no.2 did not raise any such objection. There is sufficient

identity of the encroached portion as established from the admission of defendant no.1. Morevoer, the mandatory injunction granted by the trial court is required to be considered. The trial court has directed to remove the structure which appears to have been hurriedly raised. Therefore, such objection raised by the learned advocate for the appellant is of no help and in any case it cannot be regarded as substantial question of law. The defendant no.1/appellant did not adduce any evidence before the trial court. The defendant no.2 is bound by the decree rendered against the defendant no.1 at whose behest he was put into possession. His interest cannot be dis-associated from interest of defendant no.1. Moreover, he has no independent right to claim any part of the property in question. As such the impugned judgment is quite sustainable. In absence of any other substantial question of law, I have no hesitation in holding that the present appeal cannot be entertained in view of the provisions of section 100 of the CPC. The appeal is therefore dismissed.

No order as to costs.

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